

87-1509

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Supreme Court, U.S.
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No. 87-

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DAVID T. HODDER,

Petitioner.

v.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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March 9, 1988

QUESTIONS PRESENTED

1. Where a district court makes special findings that demonstrate that it convicted the defendant of participating in a conspiracy that differed in time and object from the conspiracy alleged in the indictment, may a federal court of appeals rely upon the lower court's otherwise unsupported general finding tracking the language of the indictment as negating the existence of a prejudicial variance?

2. Do this Court's decisions defining prejudicial variances require reversal where

(a) the indictment alleged that a private contractor entered into a pre-award conspiracy with a federal employee to obtain the award of a government contract in exchange for an agreement to award a sub-contract to the federal employee, and

(b) where the prosecution sought only to prove and the district court's detailed special findings that show that it convicted the private contractor of entering into a post-award conspiracy in connection with the award of the sub-contract solely in the expectation that "subtle benefits" would accrue as a result of the federal employee's receipt of an improper benefit?

3. Did the combination of

(a) the overbroad conspiracy count;

(b) the improper multiplication of one aiding and abetting count into thirteen that resulted in the reversal of the convictions on twelve of those counts;

(c) the district court's refusal to grant separate trials for the private contractor, who had proclaimed his innocence, and the federal employee, who had admitted his guilt; and

(d) the prosecution's decision to rely solely upon indirect and circumstantial evidence so far prejudice the private contractor's right to a fair trial as to call for review by this Court to determine whether the judgment below can be reconciled with the decisions of other courts of appeal or sanctioned a departure from the proper course of judicial proceedings that should be corrected?¹

¹ Petitioner was tried with a co-defendant Richard C. Jewell. The court of appeals heard the cases together but issued separate opinions.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DAVID T. HODDER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

David T. Hodder petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment that court entered against him.

OPINIONS BELOW

The opinion of the court of appeals was not reported. It is set out in the appendix to this petition at 1 - 7. The district court made specific findings in an Opinion and Verdicts that was not reported. The Opinion and Verdicts is set out in the appendix at 8 - 22. Peti-

tioner was tried with a co-defendant and their separate appeals were consolidated for argument. The court of appeals issued an opinion in the companion case that is reported as United States v. Jewell, 827 F.2d 586 (9th Cir. 1987). A copy of the opinion is set out in the appendix at 23 - 32.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1987 (A. 33). A timely petition for rehearing and suggestion for rehearing en banc was filed and was denied by the court of appeals on December 10, 1987. On February 11, 1988 the Court extended the time within which this petition might be filed until March 9, 1988 (O'Connor, J.). The petition was filed on that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioner was convicted of a conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and of aiding and abetting, in violation of 18 U.S.C. § 2, a federal employee and co-defendant below who violated the provisions of the federal employee conflict of interest statute codified at 18 U.S.C. § 208(a). The provisions of the three statutory sections involved are set out in the appendix at 66 - 68.

STATEMENT OF THE CASE

Introduction

This case is about government contracting. Petitioner David Hodder, a former Chief Scientist at North American Rockwell, is the sole proprietor of Geoscientific Systems and Consulting ("GSC"), a small Southern California, earth science consulting firm with remote sensing exper-

tise. Through GSC, Hodder undertook to perform for the U.S. Department of the Interior, Bureau of Land Management (BLM), an air quality survey in Nevada. The contract was offered under the federal government's small business set aside program. After advertisement and mailing of eighty-two bid solicitations, one of which BLM mailed to GSC, BLM received three timely bid proposals. Linda Warney, A BLM regional contractor officer in Denver, awarded the contract to GSC based upon the favorable recommendation of a Technical Proposal Evaluation Committee (TPEC) and the fact Mr. Hodder agreed to perform the Nevada Air Quality Study at for less than the cost proposed by the next closest bidder.

This case arose after completion of the contract when the government discovered that a federal employee, Richard Jewell, the Contract Officers Authorized Rep-

resentative (COAR), had benefitted from work performed on the contract which he had supervised in violation of the federal conflict of interest statute. Mr. Jewell admitted that he controlled a company to which, aerial photography, a component of the main contract, had been subcontracted.

The government filed an indictment that sought to impose criminal liability on the private contractor, Mr. Hodder, as a conspirator and an aider and abettor for the admitted violation by the federal employee. The indictment alleged a conspiracy that predated and had as its object for Hodder obtaining a government contract for GSC.

At trial, the government declined to present any evidence of a pre-award conspiracy. Instead, it offered circumstantial evidence to support its claim that Hodder entered into a conspiracy with and began aiding and abetting Jewell, the

government employee, some four months after the award of the contract.

The Indictment

The indictment alleged that a private contractor had conspired with a federal employee to defraud the United States (A. 35 - 49). The private contractor was David T. Hodder, chief scientist and owner of Geoscientific Systems and Consulting ("GSC") of Playa del Rey, California. The federal employee was Richard C. Jewell, a GS-12 hydrologist employed by the federal Bureau of Land Management ("BLM") at its Nevada office.

The grand jury alleged a conspiracy that antedated and, from Hodder's standpoint, had as its object the award of a BLM contract to GSC. According to the indictment, the conspiracy was established "[b]eginning on or about November 1980" (A. 37). The indictment alleged that "[i]t was a part [or a further part] of

the conspiracy": (1) that Jewell proposed a study of the air quality of Nevada that involved aerial photography; (2) that, on December 29, 1980, Hodder submitted a proposal on behalf of GSC that included a component for aerial photography; (3) that Jewell used his position as chair of a technical proposal evaluation committee to recommend that negotiations be conducted only with Hodder and GSC; and (4) that Hodder agreed to subcontract the specified aerial photography work through a series of conduit organizations so that the work would be performed by Jewell for Jewell's personal benefit and profit. (id. at 40 - 41). The grand jury explicitly alleged that: (1) Hodder's submission of the GSC proposal "[o]n or about December 29, 1980" and (2) Jewell's participation at the evaluation committee meeting "on or about January 5-7, 1981" were "overt acts" committed "[i]n furtherance of the above de-

scribed conspiracy and to accomplish its objectives" (id. at 44 - 45).

The remaining overt acts alleged in the indictment concerned events that began four months after the award of the contract, in April 1981, in connection with Hodder's selection of the aerial photography subcontractor and with the performance and progress payments made over the remainder of the contract. Specifically, the indictment alleged: (1) that in April 1981, Hodder formed an affiliate, Geo Satellite Surveys ("GSS"), to which GSC subcontracted the taking and analysis of the aerial photographs required by the contract; (2) that in May 1981, Jewell rented a post office box for the two companies through which he concealed his role, Hamilton Photography and J-Co Aerial Surveys ("J-Co"); and (3) that as part of the conspiracy, GSS subcontracted the aerial photography to Hamilton Photography

which in turn subcontracted the same services to J-Co. (A. 41, 44 - 45.)

According to the indictment, Hodder and Jewell each committed a further and separate offense each time Jewell approved a request for progress payment under the contract. Between June 17, 1981, and September 1982, Jewell approved thirteen such progress payments. The indictment alleged that in each occasion, Jewell committed a separate violation of the federal employee conflict-of-interest provisions codified at 18 U.S.C. § 208(a). Hodder was charged with thirteen counts of aiding and abetting Jewell in these violations. (A. 49 - 63.)

The Trial

Hodder and Jewell were tried in a "dual" trial by the district court sitting without a jury. Before the trial began, Jewell admitted that he had violated the provisions of 18 U.S.C. § 208(a) by per-

sonally profiting from the aerial photography subcontract. He challenged the conspiracy count and argued that he could only properly be convicted of a single violation of the conflict-of-interest statute. Hodder denied that he had conspired to defraud the government or that he had intended to aid and abet Jewell's criminal activity in any way and sought a separate trial.

At trial, the government made no attempt to prove the establishment of the conspiracy alleged in the grand jury's indictment. The government offered no evidence, direct or indirect, to suggest any contact between Mr. Hodder and Mr. Jewell concerning the air quality prior to January 7, 1981. Mr. Hodder's testimony was consistent with the government's evidence and was inconsistent with a finding of any impropriety. At the close of the trial, the court reserved its ruling. Two weeks

later, the district court filed an Opinion and Verdict, making detailed specific findings of fact as well as a general finding that Hodder was guilty of conspiracy and of thirteen aiding and abetting offenses.

The District Court's Findings

The district court's special findings make it clear that it had convicted Hodder of having entered into a post-award conspiracy in connection with the award of the aerial services subcontracts to GSS in April 1981 and thereafter to Hamilton Photography and J-Co. (A. 8 - 22) The court specially found "that Defendant Jewell established Hamilton Photography and Defendant Hodder established GSS for the purpose of insulating and disguising payments from the Bureau of Land Management to Jewell through Hodder" (id. at 11 - 12). To establish Hodder's post-award knowledge the court relied upon circum-

stantial evidence concerning invoices submitted in May 1981 and payments made in October 1982. The import of these findings are confirmed by two further special findings. The court found that:

. . . it appears clear that Jewell was motivated by the monetary benefits he derived under the agreement. The benefits to Hodder, while more subtle, were quite real. In addition to the additional monetary benefits he derived from the handbook [a mid-1982 addition to the contract], he insured a continued close relationship with Defendant Jewell and could expect only superficial scrutiny over his contract.

(A. 16.) Finally the district court explicitly found that the only "overt acts" in furtherance of a conspiracy were those beginning in April 1981, "the overt acts set forth in paragraphs 3 through 16 on pages 7 through 9 of the Indictment" (id., p. 6). The district court did not find that the first two overt acts alleged by the grand jury, the only two overt acts

that antedated the award of the main contract were a part of the conspiracy for which it convicted Hodder. These specific findings conflict with the district court's general finding of guilt (*id.* p. 6).

The court of appeals reversed twelve of the aiding and abetting convictions as multiplicitous, but affirmed the convictions on the conspiracy count and an unspecified aiding and abetting count.¹

REASONS FOR GRANTING REVIEW

There are three specific reasons why the Court should grant review in this case. The decision conflicts with the law concerning prejudicial variances established by decisions of this Court. The question whether a court of appeals may rely upon a general finding that conflicts

1. The court's decisions in this and in the companion case, United States v. Jewell, No. 86-1360 (Sept. 12, 1987) are reproduced in an Appendix ("A.") to this petition for convenience.

with special findings of fact made by the district court raises a question of exceptional importance to the proper administration of justice and the proper allocation of functions between the courts of appeals and the district courts. The court of appeals decision rejecting the claim of unfair prejudice in the prosecution and trial appears inconsistent with the standard established in the Fifth Circuit in United States v. Weischenberg, 604 F.2d 328 (5th Cir. 1979). Two aspects of this case enhance the importance of those reasons and independently establish the need for review by this Court. This is the first decision in which the government has used conspiracy and aiding and abetting theories to impose criminal liability upon a private contractor for a federal employee's violation of the conflict-of-interest statute. Petitioner does not contend that those theories are not avail-

able to the government in a proper case. He does submit, however, that the use of those theories in the context of governmental contracting raises important questions that require guidance from the Court.

1. This Court should grant review because the decision of the court of appeals conflicts with the decisions of this Court governing prejudicial variances. Hodder claimed that there was a fatal variance, but the court of appeals overlooked or misapprehended the nature of the variance claimed and the law of the circuit on this point. This is not merely a case in which the trial court "did not consider that all of the acts specified in the indictment were part of the conspiracy" (A. 4).

The indictment alleged a conspiracy that was formed prior to and had as its object the award of the general contract.

The trial court, however, specifically declined to find that any of the pre-award overt acts alleged were part of the conspiracy. Moreover, the trial court specifically found that the conspiracy to defraud had been formed some four months after the award of the general contract in connection with the award of a subcontract with "subtle benefits" being the only object on the private contractor's side. The court of appeals failed to consider whether those special findings established that the private contractor may have been convicted of a conspiracy other than the one alleged by the grand jury for which reversal would be required.

The court of appeals decision conflicts with the precedents adopted by this court and the policies those precedents were intended to establish. See Berger v. United States, 295 U.S. 78 (1935); Kotekos v. United States, 328 U.S. 750

(1946); Stirone v. United States, 361 U.S. 212 (1960).

2. This case poses an important question concerning the proper role of the courts of appeals in reviewing judgments in cases where a district court has made detailed special findings based upon the evidence presented to it. There was a conflict between the district court's special findings of fact and its general finding of guilt. The district court's special findings make it clear that it had convicted the private contractor of a post-award conspiracy that varied substantially from the conspiracy alleged by the grand jury. The appellate court, however, relied upon the district court's general finding of guilt "using the precise words of the indictment" (A. 3) to affirm the conviction.

The precise issue has not been addressed, but an appellate decision relying

upon a general finding that conflicts with the trial court's special findings would render the provisions of Rule 23(c) of the Federal Rules of Criminal Procedure meaningless. See United States v. Brown, 716 F.2d 457 (7th Cir. 1983) (for an illustrative analysis of the function special findings should play in an analogous case based upon circumstantial evidence); compare Anderson v. City of Bessemer City, 105 U.S. 1504 (1985) and Icicle Seafood, Inc. v. Worthington, 106 S. Ct. 1572 (1986).

The decision to rely upon a general finding that conflicted with the district court's specific findings of fact interjected an issue of exceptional importance into this case concerning the proper role of the court of appeals in reviewing findings made by a district court. The issue is clearly presented. Hodder's principal claim on appeal was that the

evidence was wholly insufficient to support a finding that he had entered into the pre-award conspiracy alleged by the grand jury and that the district court had unfairly convicted him of a post-award conspiracy having an object different from that alleged by the grand jury. The specific and detailed findings of fact made by the trial court support that view.

At a minimum, these claims, in light of the specific findings made by the trial court, must impose an enhanced burden on an appellate court to identify evidence in the record that would have supported the additional specific findings necessary to sustain a conviction on the conspiracy alleged in the indictment. The unexplained reliance by the appellate court upon the general finding here is specially troubling because the government did not even attempt in its brief to identify evidence that would have supported the necessary

additional findings.²

3. The reasons for review by this Court are enhanced by the fair trial concerns presented by the record in this case. Petitioner does not contend that these concerns or the third question presented would, alone, warrant review by this Court. The presence of those concerns, however, enhances the importance of the other issues and makes this an appropriate case through which the Court may properly address concerns that might otherwise escape review.

The court of appeals misapprehended the nature of the prejudice to Hodder that resulted from the disparate factors that

2. Counsel recognizes that the unpublished decision will not establish precedent for this practice. Nonetheless, the memorandum illustrates a practice that is unfair to Hodder and inconsistent with the proper performance of the appellate function. Counsel submits that the issue thus interjected is of such importance that it should be reconsidered by the panel or considered by the Court.

combined in this case. In addition to the district court's decision to conduct a "dual" trial, there were other equally important factors. The grand jury had been persuaded to return an indictment on the apparent theory that only the award of the general contract could provide sufficient consideration to induce a person of Hodder's stature and background to enter into a conspiracy with a mid-level BLM employee. At trial, however, the prosecutor presented no evidence to support the pre-award conspiracy alleged by the grand jury. Instead, he presented evidence in support of a different and far narrower conspiracy. As the court of appeals found, the prosecutor also had improperly multiplied the aiding and abetting counts in a manner that fragmented the issues and forced Hodder to confront and the district court to address multiple issues rather than one.

Hodder claimed that it was this combination of prosecutorial strategems that brought this case within the principles articulated by the Fifth Circuit Court of Appeals in United States v. Weischenberg, 604 F.2d 328 (5th Cir. 1979) and noted with approval in United States v. Little, 753 F.2d 1420, 1443 (9th Cir. 1984).

These are specially important concerns when the government seeks to use the prosecutorial net to impose criminal liability upon a party to a legitimate business transaction such as the transaction in this case. Scientists and businessmen in the position of a David Hodder who contract to perform services for their government serve the legitimate ends of both government and business. These are legitimate transactions and those who participate in them should not be placed in the position of persons engaged in illegitimate transactions, such as drug

dealing, where any confederation for a common end must in its nature result in a corrupt conspiracy. This Court should scrutinize the practices employed as well as the evidence produced to assure that the prosecutorial net of conspiracy is contained within its proper bounds. These concerns are sufficient to warrant granting review in this case.

4. The context in which this case arose enhances the need for review by this Court. This is the first case to come before the Court in which the government has employed conspiracy and aiding and abetting theories to extend criminal liability to a private contractor for conflict-of-interest violations by a federal employee. Contracts between federal agencies and private contractors are an important and legitimate means of effecting the business of the federal government. Given their general importance and the context in

which they arise, these questions should be resolved promptly and authoritatively by this Court to provide necessary guidance for the future.

The background of the defendants also makes this an appropriate case for further consideration. Appellant Hodder was a pioneer in the remote sensing field and a former chief scientist for North American Rockwell. He had served that Corporation as Chief Scientist performing classified and other government contracts throughout his career. In the late 1970's, after Rockwell sold the subsidiary where he was employed, Hodder established a small business concern, GSC, through which he had continued to obtain and perform contracts for various federal agencies and other nations, including work for BLM. Jewell was a mid-level hydrologist who routinely served as the local contract officer in BLM's Nevada office. The facts in this

case strongly imply a person of the stature of Hodder would enter never into a conspiracy with a person in the position of Jewell.

Against this background, the decision below is capable of two readings, neither of which is consistent with the law or the needs of the situation.

The decision can be construed as a ruling that the evidence was sufficient to enable a rational trier of fact to find beyond reasonable doubt that Hodder and Jewell entered into a pre-award conspiracy as alleged in the indictment. If that were the true basis of the decision, then no private contractor could safely deal with the government. A contractor who had done good work for a particular office would run the risk that his firm would be included in the bidder's list in future projects requiring the same skills. Unbeknownst to him, he might submit a proposal

and obtain an award only to discover that the same federal employee was still administering contracts for the office. Thereafter, should the federal employee violate the conflict-of-interests statute, the government could claim the whole contract was the product of a conspiracy and its "evidence" would be sufficient to support a conviction. Neither the objectives of the criminal justice system nor the legitimate needs of the governmental contracting process can be reconciled with such a scenario. No rational trier of fact should be permitted to find such a conspiracy on evidence presented here.

Alternatively, the decision below may be read as holding that a conviction based upon evidence that it viewed as sufficient to support a finding that Hodder and Jewell entered into a conspiracy that differed materially in time and object from the conspiracy that the grand jury found

probable cause to allege did not create a prejudicial variance. If that were the true basis of the panel's decision, the decision would not only conflict with the law of the circuit, it would also undermine the role of the grand jury and provide incentives for prosecutorial conduct that is not consistent with the fair administration of justice.

Accordingly, petitioner submits that this court should grant the review in order that it may consider the important questions presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 28, 1987 three copies of the foregoing Petition for Writ of Certiorari were mailed to:

The Honorable Charles Fried
Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20505

Martin H. Hodder

APPENDIX



NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA) CA No. 86-1324
Plaintiff-Appellee,)
)
v.) DC No.
) CR-R-85-42-HDM
DAVID T. HODDER,)
) MEMORANDUM*
Defendant-Appellant.)
)

Appeal from the United States District
Court for the District of Nevada
Honorable Howard D. McKibben,
District Judge, Presiding
Argued and Submitted August 10, 1987
San Francisco, California
FILED: September 4, 1987

Before: WRIGHT, FARRIS, and THOMPSON,
Circuit Judges.

Hodder was convicted of conspiring
with a government official to defraud the
United States, in violation of 18 U.S.C. §
371, and thirteen counts of aiding and
abetting a government official in the pos-

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

session of a prohibited financial interest, in violation of 18 U.S.C. § 208(a). Hodder challenges his conspiracy conviction on two grounds: that the court convicted him of a crime that differed materially from the crime alleged in the indictment, and that the evidence was not sufficient to prove the agreement that is an essential element of conspiracy. He argues also that the evidence was not sufficient to support the thirteen aiding and abetting convictions.

The indictment charged that Hodder had entered into a conspiracy with a government official, Jewell, "to defraud the United States of and concerning its governmental functions and rights." The conspiracy statute, 18 U.S.C. § 371, provides that it is a crime for two or more persons to "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

in any manner or for any purpose." The indictment set out at length the factual background of the alleged conspiracy, beginning with the point at which Hodder submitted a bid for a contract which allegedly would serve as a vehicle for the payment of government funds to Jewell's personal business. Hodder contends that the indictment was for conspiracy to commit fraud against the government, but that the trial court convicted him of the different crime of conspiracy to commit an offense against the United States, which is also covered by 18 U.S.C. § 371. Hodder argues that the court denied him the right to be tried on the grand jury's charges and to prepare a defense. The district court specifically found Hodder guilty of a conspiracy to defraud the government, using the precise words of the indictment. The court convicted Hodder on the basis of essentially the same acts

that were recounted in the indictment. It is of no consequence that the court did not consider that all of the acts specified in the indictment were part of the conspiracy. The crime charged was the crime of which Hodder was convicted.

Hodder also contends that the evidence of a conspiracy was insufficient to convict him. We review the evidence in a light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); United States v. Marabelles, 724 F.2d 1374, 1377 (1985). We conclude that any rational trier of fact could find beyond a reasonable doubt that Hodder willfully became a member of a conspiracy to defraud the government, and that he committed several overt acts in furtherance of the conspiracy. The court

could reasonably infer from all of the evidence that Hodder was aware that the company to which he sub-contracted work was controlled by Jewell.

Hodder next contends that the evidence was not sufficient to convict him of thirteen counts of aiding and abetting Jewell in having a prohibited financial interest in a government contract. Hodder made a series of payments to Jewell's business for work on the government contract. The aiding and abetting charge depends on a showing that Hodder knew that the business was Jewell's. Hodder argues that there was no evidence that he knew of Jewell's deception. Our review of the record satisfies us that any reasonable trier of fact could find beyond a reasonable doubt that Hodder was aware that he was actually paying Jewell. The same evidence was crucial in establishing the conspiracy.

However, we must reverse twelve of the thirteen aiding and abetting counts as multiplicitous. We have found in a separate opinion, United States v. Jewell, No. 86-1360 (1987), that Jewell could be convicted only of one count of participating in a contract in which he had a financial interest, in violation of 18 U.S.C. § 208. It follows that Hodder can be convicted only of one count of aiding and abetting Jewell in that crime.

Hodder argues finally that his trial was fundamentally unfair because of its "dual" nature. He argues that the United States "used a conspiracy as a device to simplify its burden of proving the elements of aiding and abetting on each of thirteen occasions alleged and compartmentalized the 'units of prosecution' to maximize the defendant's risks and burdens." We find nothing improper in the United States' reliance on a conspiracy theory.

The conspiracy and aiding and abetting charges all depended upon a showing that Hodder was aware that Jewell was a de facto subcontractor on a government contract and that Hodder furthered the fraud against the government by his actions. There was no impropriety in prosecuting this case as an overarching conspiracy with several components. Hodder has suggested nothing that prevents the United States from charging on several counts and "maximiz[ing] the defendant's risks and burdens."

Hodder's conspiracy conviction is affirmed. All but one of his convictions for aiding and abetting are reversed on remand. The district court may adjust Hodder's sentence accordingly.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, CR-N-85-42-HDM

Plaintiff,

vs.

OPINION and
VERDICTS

DAVID HODDER, and
RICHARD C. JEWELL,

Defendants.

Defendants Richard Jewell and David Hodder are charged by Indictment with violating Title 18, U.S.C. § 371, Conspiracy, and Title 18, U.S.C. § 208(a) and § 2, Personal Financial Interest and Aiding and Abetting. The defendant David Hodder is charged with violating Title 18 U.S.C. § 287 by filing false, fictitious and fraudulent claims with the Department of Interior, Bureau of Land Management. The court will address the conspiracy charge first. 18 U.S.C. § 371 provides:

"If two or more persons conspire either to commit any offense

against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy. . . ."

such persons shall be guilty of an offense against the United States. The elements the government must establish beyond a reasonable doubt as to Count I before the defendant can be found guilty are: That the conspiracy was willfully formed and existed at or about the time alleged in the Indictment; that the defendant willfully became a member of the conspiracy; that the defendant committed one or more of the overt acts alleged in furtherance of the conspiracy. Applying these elements to the facts of this case, the court finds and concludes as follows:

The government established beyond a reasonable doubt that between the period November, 1980 and January, 1983:

1. Defendant Jewell was employed as a GS-12 Hydrologist by the United States Department of Interior, Bureau of Land Management.

2. Defendant Jewell was chairman of the Technical Proposal Evaluation Committee which recommended that negotiations for the Nevada Air Quality Study be conducted with Geoscientific Systems and Consulting (GSC) owned by Defendant David Hodder. That part of that study included an estimated cost of \$18,000 for visibility measurements accomplished by means of aerial photography.

3. Defendant Jewell was appointed as the contracting office's authorized representative to supervise the performance and payment of claims to GSC for the air quality study contract which was awarded to GSC.

4. Defendant Jewell was hired by GSC through a business or businesses known as

J-Co and Hamilton Photography at \$150 per hour to take aerial photographs as a sub-contractor under the GSC air quality contract with BLM.

5. Defendant Jewell took the photographs and forwarded the same to David Hodder at GSC. The photographs were received by GSC through an entity known as Geo Satellite Surveys (GSS). The court finds that at all times relevant herein GSS performed no work independent of GSC and Eric Hodder did nothing independent of David Hodder. The court, after careful consideration of the relationship of Defendants Hodder and Jewell on this project and previous projects, and after considering the temporal proximity between the formation of GSS and Hamilton Photography and the fact neither entity performed significant services nor derived significant income other than that generated by this project, concludes that Defendant Jewell

established Hamilton Photography and Defendant Hodder established GSS for the purpose of insulating and disguising payments from the Bureau of Land Management to Jewell through Hodder.

In addition, the court finds two items of documentary evidence to be persuasive circumstantial evidence that Defendant Hodder knew that Defendant Jewell was receiving payments through Hamilton Photography for the aerial services under the GSC contract with BLM. First, Exhibit 30 reflected that J-Co (the other entity owned by Defendant Jewell which he used in tandem with Hamilton) billed Hamilton for flying services on May 30, 1981, Hamilton billed GSS for the same services on exactly the same date and GSS also billed GSC for those same services on May 30, 1981. Second, on October 27, 1982 a check for \$3,423 from GSS to Hamilton Photography representing payment for aerial work

during February, 1982 (Exhibit 39g) and on October 28, 1982 a check for \$3,440 from GSS to Hamilton for aerial work during March, 1982 was, according to the testimony of Defendant Hodder, mailed to Pismo Beach, California. Yet the checks were deposited in Nevada National Bank in Reno on October 29, 1982.

The reasonable and compelling inference the court draws from these transactions is that Defendant Hodder delivered these checks and prepared these invoices with Defendant Jewell with both having full knowledge of the other's participation in the conspiracy.

Although the court has concluded the evidence presented by the government in its case in chief, together with the reasonable inferences drawn from that evidence, established the guilt of Defendants Jewell and Hodder beyond a reasonable doubt, the testimony of Defendant Hodder

confirmed those findings and conclusions. While the court found Defendant Hodder to have a remarkable memory as to details surrounding most aspects of his air quality contract with BLM, he had great difficulty remembering the details of communications with representatives of Hamilton Photography yet his contract with Hamilton was significant and a critical portion of the air quality contract. The following evidence about Hodder's relationship with Hamilton was not credible: his conversations with a person he only knew to be "Kay"; that flights were made by Hamilton without payment or a written contract; that no meeting between the representatives of the two entities ever occurred; that all discussions were over the telephone; that the person by the name of "Kay" always called him with the exception of the one occasion in which conveniently, around July 4th, he reached "Kay" at the

Hamilton number; that payments were as much as seven to eight months late and yet no requests for payment were ever made in writing or otherwise; that Defendant Jewell never questioned Defendant Hodder about the personal involvement in the aerial flights and photography notwithstanding this field was his particular interest and field of expertise; that Defendant Hodder expressed no surprise that Defendant Jewell was unconcerned about the qualifications or expertise of his pilot and photographer.

The government's evidence against both the Defendants Hodder and Jewell, independent of Defendant Hodder's testimony, established the guilt of both defendants on Counts I through XIV of the indictment. The testimony of Defendant Hodder simply corroborated the conclusion reached by the court.

While motive is not an element of the offense, it appears clear the defendant Jewell was motivated by the monetary benefits he derived under the agreement. The benefits to Defendant Hodder, while more subtle, were quite real. In addition to the additional monetary benefits he derived from the handbook, he insured a continued close relationship with Defendant Jewell and could expect only superficial scrutiny over his contract.

Therefore, for the foregoing reasons, the court finds the government established beyond a reasonable doubt that Defendant Richard Jewell and Defendant David Hodder entered into an agreement to defraud the United States Government of and concerning its governmental functions; that they did so willfully with knowledge of the activities of the other, and in furtherance of the conspiracy, and committed the overt

acts set forth in paragraphs 3 through 16 on pages 7 through 9 of the Indictment.

In Counts II through XIV of the Indictment, it is alleged Defendant Richard Jewell, aided and abetted by Defendant David Hodder, unlawfully and knowingly participated personally and substantially as a government officer and employee through decision, approval and recommendation, in signing certain certificates for Contract Payment/Invoice submitted by GSC to BLM under the air quality contract.

The evidence established beyond a reasonable doubt that Defendant Richard Jewell took photographs for the Nevada Air Quality Project for which he received payments from GSC which payments he recorded as the Contracting Officer Authorized Representative (COAR) for the project. He executed each of the certificates for Contract Payment/Invoice submitted by GSC and, as the court has previously deter-

mined, each such action constituted a separate offense.

For the reasons the court has previously articulated in this decision, the defendant Hodder knew the defendant Jewell had a present financial interest in the air quality contract and that he participated personally and substantially in the contract. With this knowledge and by his activity in making payments to Defendant Jewell through GSS and Hamilton Photography, the defendant Hodder aided and abetted Defendant Jewell in the commission of each offense set forth in Counts II through XIV of the Indictment.

Finally, the defendant Hodder is charged in Counts XV, XVI and XVII with violating Title 18, United States Code, Section 287 by filing false, fictitious and fraudulent claims with the BLM. To establish these offenses, the government must establish beyond a reasonable doubt

(1) that a claim was made or presented upon or against an agency or department of the United States; (2) That such claim was false, fictitious or fraudulent; (3) That the defendant knew that such claim was false, fictitious or fraudulent when made; (4) That the defendant acted wilfully.

The court has carefully scrutinized the evidence presented by the government on each of these counts. Count XV is supported by Exhibits 54 through 63(b) and the testimony relating thereto. Count XVI is supported by Exhibits 64 through 70 and Count XVII is supported by Exhibits 71 through 78. While the court entertains reasonable suspicions that portions of each of these claims were false, fictitious or fraudulent and that Defendant Hodder had knowledge of such facts, the court is not persuaded the government established these offenses beyond a reasonable doubt. While the evidence was com-

pellng in showing loose practices and unusual billings together with some substantial evidence of inflated prices, the court was not persuaded the government established these offenses beyond a reasonable doubt. The evidence presented in connection with these alleged offenses does, however, further illuminate Defendant Hodder's motivation for conspiring with Defendant Jewell as charged in Count I of the Indictment and the benefit he derived from his agreement with Defendant Jewell.

Therefore, for the foregoing reasons and on the basis of all the evidence presented and received during the trial, the court finds and concludes:

The defendant Richard Jewell is guilty of conspiracy under Title 18 U.S.C. § 371 as charged in Count I of the Indictment. The defendant Richard Jewell is guilty of having a personal financial in-

terest under Title 18 U.S.C. § 208(a), as charged in Counts II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the Indictment.

The defendant David Hodder is guilty of conspiracy under Title 18 U.S.C. § 371 as charged in Count I of the Indictment. The defendant David Hodder is guilty of aiding and abetting Richard Jewell in having a personal financial interest under Title 18, U.S.C. § 208(a) as charged in Counts, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the Indictment. The defendant David Hodder is not guilty of filing a false, fictitious and fraudulent claim under Title 18 U.S.C. § 287 as charged in Counts XV, XVI and XVII of the Indictment.

IT IS SO ORDERED. It is further ORDERED that the verdicts of this court shall be made a part of the record of this court and that a Judgment of Guilt shall

be entered in accordance with these verdicts.

IT IS FURTHER ORDERED this matter is referred to the Department of Parole and Probation for a presentence report.

IT IS FURTHER ORDERED the defendants appear before the court at 3:00 P.M. on the 3rd day of October, 1986 for the purpose of pronouncement of judgment and imposition of sentence.

Dated this 25th day of July, 1986.

UNITED STATES DISTRICT JUDGE

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,) CA No. 86-1360
Plaintiff-Appellee,) DC No. CR-R-
) 85-42-HDM
v.) OPINION
RICHARD C. JEWELL,)
)
Defendant-Appellant.)
)

Appeal from the United States District
Court for the District of Nevada
Howard D. McKibben, District Judge,
Presiding

Argued and Submitted August 10, 1987
San Francisco, California
FILED: Sept. 8, 1987

Before: WRIGHT, FARRIS, and THOMPSON,
Circuit Judges.

FARRIS, Circuit Judge:

Jewell, an employee of the United States Bureau of Land Management, was convicted of thirteen counts of having a personal interest in a government contract, in violation of 18 U.S.C. § 208(a), and

one count of conspiracy, in violation of 18 U.S.C. § 371.

On appeal, Jewell argues first that the prosecution multiplied a single violation of 18 U.S.C. § 208(a) into thirteen separate counts. Section 208(a) makes criminally liable

whoever . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . .

It is undisputed that Jewell participated substantially as an officer of the United States in a contract in which he

had a personal financial interest. The indictment charged a separate violation of section 208(a) for every occasion on which Jewell signed, in his capacity as a government official, an invoice authorizing payment by the contractor to his company as subcontractor. All of the authorizations were written under a single contract. Jewell argues that because there was only one contract, he was guilty of only one conflict of interest. We agree.

Whether 18 U.S.C. § 208(a) allows multiple counts in this case is a question of statutory interpretation, which we review de novo. Trustees of Amalgamated Ins. Fund v. Geltman Industries, 784 F.2d 926, 929 (9th Cir.) , cert. denied, 107 S. Ct. 90 (1986).

The district court considered the question of multiplicity in the indictment and declined to force the prosecution to elect from among the allegedly multiplici-

tous counts. The court found that each time Jewell signed an invoice, "he allegedly participated personally and substantially as a Government employee through approval of a claim in which he had a substantial financial interest." The court relied primarily upon the following language from United States v. Irons, 640 F.2d 872 (7th Cir. 1980):

the legislative history of Section 208 demonstrates an intention to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions. . . . the scope of 18 U.S.C. 208 includes acts which lead up to the formation of contract, as well as those which might be performed in the execution of the contract.

640 F.2d at 876-77. The district court took this statement as an indication that section 208(a) was intended to punish separately each step in transactions involving conflicts of interest. When taken in

context, however, the import of the Seventh Circuit's statement is clear: liability for conflict of interest may be founded on a variety of acts leading up to the formation of a contract even if those acts are not specifically mentioned in the text of section 208(a). The section's "catch all" language ("participates . . . through decision, approval, recommendation, the rendering of advice, investigation, or otherwise. . . .") was designed to allow prosecution on the basis of any type of action taken to execute or carry to completion a contract. 640 F.2d at 878. In Irons, although the opinion noted that several actions separately constituting "participation" were taken pursuant to contracts as to which there was a conflict of interest, the indictment was in two counts -- one for each contract in which the defendant was involved. Id. at 874-75. The government did not attempt to

charge separately each of the acts taken under each contract. The court ruled that many types of actions could constitute participation, not that each of those actions was a separate violation of the statute.

The indictment here alleged that each time Jewell signed an invoice for payment to his company, he participated in "a contract, claim and matter in which . . . he had a financial interest." The routine approval of each invoice under the contract was not participation in a discrete "claim" or "particular matter" within the meaning of the statute. Jewell's signing of invoices was part of an ongoing process of monitoring the government contract with Hodder in which Jewell had a financial interest. If every minor action that Jewell took in relation to the contract could be considered a separate "matter" under section 208(a), his participation in the con-

tract could be multiplied into endless criminal counts. Congress referred in section 208(a) to participation in a contract, claim, or other particular matter. Use of the disjunctive indicates that Congress did not intend to cover participation in a minor claim or other matter coming under a contract. By "claims" Congress meant something more substantial - something on the order of a separate government proceeding. See Perkins, The New Federal Conflict-of-Interest Law 76 Harv. L. Rev. 1113, (1963) (commenting on the earlier, essentially similar version of the statute). A matter may form a separate basis for liability under section 208 only if it is a discrete transaction. It cannot be part of a larger transaction, and cannot be continuous or overlapping with another matter. Jewell's participation in those claims was simply part of his participation in the contract, a sin-

gle violation under the terms of section 208(a).

This distinction was recognized in Irons. There, as here, the defendant's various actions regarding a contract were part of his participation in that contract, not separate "participations" bringing separate liability. Other courts have consistently treated a series of actions taken by a defendant in connection with a particular matter as a single instance of participation in the matter. See United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986), petition for cert. filed, April 2, 1987 (Assistant U.S. Attorney charged with one count of participating extensively in the case in which he had financial interest); United States v. Conlon, 481 F. Supp. 654 (D. D.C. 1979), modified, 628 F.2d 150 (D.C. Cir. 1980) (several actions on one proposal prosecuted as one count of participation in

matter in which defendant had financial interest). We have found no other published opinions involving convictions under 18 U.S.C. § 208(a) and none have been brought to our attention.

Jewell argues also that his conspiracy conviction was unsupported by the evidence. We review the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); United States v. Marabelles, 724 F.2d 1374, 1377 (9th Cir. 1985). Jewell contends that there was no evidence that his alleged co-conspirator, Hodder, had agreed with him to defraud the United States. Hodder made a series of payments to Jewell's business for work on the government contract that Jewell was overseeing. The conspiracy charge depends on ev-

idence that Hodder knew that the business was Jewell's. We find that any rational trier of fact could conclude beyond a reasonable doubt that Hodder was aware that he was actually paying Jewell. There was evidence from which the trial court could conclude that Hodder made some payments on the subcontract directly to Jewell.

Jewell's conviction of conspiracy is affirmed. His convictions on the multiplicitous counts in the indictment -- Count III through Count XIV -- are reversed. Jewell could be convicted of only one count of violating 18 U.S.C. § 208(a) on these facts. On remand the court may adjust Jewell's sentence accordingly.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

UNITED STATES OF AMERICA) CA No. 86-1324
Plaintiff-Appellee,)
)
v.) DC No.
) CR-R-85-42-HDM
DAVID T. HODDER,)
)
Defendant-Appellant.)
)

Appeal from the United States District
Court for the District of Nevada

JUDGMENT

This cause came on to be heard on the
transcript of the record from the United
States District Court for the District of
Nevada and was duly submitted;

ON CONSIDERATION WHEREOF, It is now
here ordered and adjudged by this Court
that the order of the District Court ap-
pealed from, in this cause be, and the

same is hereby, AFFIRMED IN PART AND RE-
VERSED IN PART.

FILED AND ENTERED:
September 4, 1987

CATHY A. CATTERSON
CLERK
U.S. COURT OF APPEALS

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF)	Criminal No.
AMERICA,)	R-85-42-ECR
)	
Plaintiff,)	INDICTMENT FOR
)	VIOLATION OF TITLE
RICHARD C. JEWELL,)	18, UNITED STATES
DAVID T. HODDER,)	CODE, SECTIONS 371,
)	208, 287, 2 (Con-
Defendants.)	spiracy, Personal
)	Financial Interest,
		False Claims, Aid-
		ing and Abetting)

COUNT I

THE GRAND JURY CHARGES: THAT

1. At all times pertinent to this
indictment the United States Department of
the Interior, Bureau of Land Management,
was a department and agency of the execu-

tive branch of the United States Government with responsibility, among other things, to conduct surveys of air quality on land owned by the United States.

2. At all times pertinent to this indictment RICHARD C. JEWELL, the defendant herein, was employed as a GS-12 hydrologist by the United States Department of the Interior, Bureau of Land Management, in Reno, Nevada.

3. At all times pertinent to this indictment DAVID T. HODDER, the defendant herein, was the owner and chief scientist of Geoscientific Systems and Consulting of Playa del Rey, California, a business which conducted geoscientific surveys and studies.

4. At all times pertinent to this indictment Geo Satellite Surveys, a business owned and operated by DAVID T. HODDER and his son, Eric A. Hodder, served as a

subcontractor for Geoscientific Systems and Consulting.

5. Beginning on or about June 1981 Hamilton Photography was a photo business established as a conduit for payments from DAVID T. HODDER to RICHARD C. JEWELL and was operated by RICHARD C. JEWELL'S wife, Karen Jewell, from their residence in Reno, Nevada.

6. At all times pertinent to this indictment J-Co Aerial Surveys was an aerial photography business owned, dominated, controlled and operated by RICHARD C. JEWELL from his Reno, Nevada, residence.

7. Beginning on or about November 1980 and continuing to on or about January 1983, the exact dates being unknown to the grand jury, in the District of Nevada, RICHARD C. JEWELL and DAVID T. HODDER, the defendants herein, did unlawfully, knowingly and willfully combine, conspire and

agree together with each other and with other persons known and unknown to the grand jury, to defraud the United States Government of and concerning its governmental functions and rights, hereinafter described, that is:

(a) of and concerning its right to have its business and its affairs, particularly the transaction of the official business of the Department of the Interior, Bureau of Land Management, conducted free from fraud, conflicts of interest, corruption, dishonesty, deceit, misconduct; partiality and bias;

(b) of and concerning its right to have its officers and employees, particularly the personnel of the Department of the Interior, Bureau of Land Management, free to transact the official business of the United States unhindered, unhampered, and unimpaired by the exertion upon them of dishonest, corrupt, unlawful, improper

and undue pressure and conflicts of interest; and

(c) of and concerning its right to the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of the defendant RICHARD C. JEWELL in his official capacity as an employee of the Department of the Interior, Bureau of Land Management, free from fraud, conflicts of interest, corruption, dishonesty, deceit, misconduct, partiality and bias resulting from his personal and pecuniary interest in the business transacted by Geoscientific Systems and Consulting with the Department of the Interior, Bureau of Land Management.

MANNER AND MEANS

8. It was part of the conspiracy that RICHARD C. JEWELL, as part of his duties as an employee of the Bureau of Land Management, proposed methodologies for a study of the air quality of Nevada to be

funded by the Bureau of Land Management. His proposal suggested the use of aerial photography services to measure "visibility" at an estimated cost of \$9,000.

9. It was further part of the conspiracy that on December 29, 1980, DAVID T. HODDER, representing Geoscientific Systems and Consulting, submitted to the Bureau of Land Management a proposal for a study of the air quality of Nevada. The proposal included an \$18,000 estimated cost for visibility measurements accomplished by means of aerial photography.

10. It was further part of the conspiracy that RICHARD C. JEWELL, Chairman of the Technical Proposal Evaluation Committee which analyzed and rated contract proposals received by the Bureau of Land Management, recommended that negotiations for the Nevada air quality study be con-

ducted "only" with DAVID T. HODDER's firm, Geoscientific Systems and Consulting.

11. It was further part of the conspiracy that following the award of the contract to study Nevada air quality to Geoscientific Systems and Consulting, DAVID T. HODDER subcontracted the performance of the aerial photography aspect of the contract to Geo Satellite Surveys which, in turn, subcontracted those same services to Hamilton Photography which subcontracted those services to J-Co Aerial Surveys.

12. It was further a part of the conspiracy that RICHARD C. JEWELL took the aerial photographs for which DAVID T. HODDER was reimbursed by the Bureau of Land Management pursuant to Geoscientific Systems and Consulting's Nevada air quality contract.

13. It was further part of the conspiracy that RICHARD C. JEWELL recommended

twelve progress payments to Geoscientific Systems and Consulting for work on the Nevada air quality contract by signing twelve Certificates for Contract Payment/Invoice submitted by Geoscientific Systems and Consulting, each of which contained a claim for aerial photography services.

14. It was further part of the conspiracy that the Bureau of Land Management reimbursed Geoscientific Systems and Consulting \$42,358 for aerial photography services provided for the Nevada air quality contract; that Geo Satellite Surveys paid \$40,442 for the same services to Hamilton Photography which paid \$40,197 to J-Co Aerial Surveys for these aerial photography services.

15. It was further part of the conspiracy that RICHARD C. JEWELL, who was appointed the Bureau of Land Management's Contracting Officer's Authorized Represen-

tative to supervise the performance and payment claims of DAVID T. HODDER and Geoscientific Systems and Consulting on the Nevada air quality contract, failed to disclose to the Bureau of Land Management that his business, J-Co Aerial Surveys, had been hired at \$150 per hour to take aerial photographs as a subcontractor on Geoscientific Systems and Consulting's Nevada air quality contract.

16. It was further part of the conspiracy that RICHARD C. JEWELL, as part of his duties as an employee of the Bureau of Land Management, initiated the purchase of a \$7,800 Aerial Photography Visibility Handbook from Geoscientific Systems and Consulting.

17. It was further part of the conspiracy that Geoscientific Systems and Consulting purchased the Aerial Photography Visibility Handbook from Geo Satellite Surveys which paid \$4,000 for graphics and

other services for the handbook to Hamilton Photography which, in turn, paid \$4,000 for editing, graphics, and other handbook preparation services to J-Co Aerial Surveys.

18. It was further part of the conspiracy that RICHARD C. JEWELL, who was appointed the Bureau of Land Management's Contracting Officer's Authorized Representative to supervise the performance and payment claims of DAVID T. HODDER and Geoscientific Systems and Consulting on the Nevada air quality contract, failed to disclose to the Bureau of Land Management that his business, J-Co Aerial Surveys, had been hired for \$4,000 to provide handbook preparation services as a subcontractor on Geoscientific Systems and Consulting's Nevada air quality contract.

OVERT ACTS

In furtherance of the above-described conspiracy and to accomplish its objec-

tives the defendants did commit the following overt acts in the District of Nevada and elsewhere:

1. On or about December 29, 1980, DAVID T. HODDER, representing Geoscientific Systems and Consulting, submitted a proposal for a Nevada air quality study to the Bureau of Land Management.
2. On or about January 5-7, 1981, RICHARD C. JEWELL chaired meetings of a Bureau of Land Management Technical Proposal Evaluation Committee which rated proposals submitted for a Nevada air quality study.
3. On or about April 15, 1981, DAVID T. HODDER, representing Geoscientific Systems and Consulting, signed a letter order for aerial photography services from Geo Satellite Surveys.

4. On or about May 5, 1981, RICHARD C. JEWELL rented post office box number

20418 in Reno, Nevada, for J-Co Aerial Surveys and Hamilton Photography.

5. On or about June 12, 1981, DAVID T. HODDER submitted to the Bureau of Land Management a Certificate For Contract Payment/Invoice from Geoscientific Systems and Consulting which included a \$3,219 claim for aerial visibility measurements.

6. On or about June 17, 1981, RICHARD C. JEWELL signed a Certificate For Contract Payment/Invoice submitted by DAVID T. HODDER for Geoscientific Systems and Consulting which included a \$3,219 claim for aerial visibility measurements.

7. On or about July 13, 1981, DAVID T. HODDER drew Geo Satellite Surveys check number 010 in the amount of \$3,219 to the order of Hamilton Photography and annotated "Invoice 5/30/81."

8. On or about May 17, 1982, DAVID T. HODDER submitted to the Bureau of Land Management a Certificate For Contract Pay-

ment/Invoice from Geoscientific Systems and Consulting which included a \$3,800 claim for aerial visibility measurements.

9. On or about June 1, 1982, RICHARD C. JEWELL signed a Certificate For Contract Payment/Invoice submitted by DAVID T. HODDER for Geoscientific Systems and Consulting which included a \$3,800 claim for aerial visibility measurements.

10. On or about November 15, 1982, DAVID T. HODDER drew Geo Satellite Survey check number 132 in the amount of \$3,338 to the order of Hamilton Aerial [sic] Photography and annotated "April invoice - Nev air qual visib."

11. On or about March 3, 1982, RICHARD C. JEWELL wrote a memorandum recommending increased funding to accommodate cost overruns projected by Geoscientific Systems and Consulting on the Nevada air quality contract.

12. On or about July 12, 1982, RICHARD C. JEWELL wrote a memorandum recommending that the Bureau of Land Management purchase from Geoscientific Systems and Consulting for \$7,800 a report on aerial visibility measurements.

13. On or about July 20, 1982, DAVID T. HODDER, representing Geoscientific Systems and Consulting, submitted to the Bureau of Land Management a cost estimate for, among other items, a report on aerial visibility measurements for \$7,800.

14. On or about September 1, 1982, DAVID T. HODDER submitted to the Bureau of Land Management a Certificate For Contract Payment/Invoice from Geoscientific Systems and Consulting which included a \$7800 claim for a report on aerial visibility measurements.

15. On or about September 1982, RICHARD C. JEWELL signed a Certificate For Contract Payment/Invoice submitted by

DAVID T. HODDER for Geoscientific Systems and Consulting which included a \$7800 claim for a report or aerial visibility measurements.

16. On or about December 20, 1982, DAVID T. HODDER drew Geo Satellite Survey check number 137 in the amount of \$4000 to the order of Hamilton Photography annotated "Handbook/Preparation/Repro."

- All in violation of Title 18, United States Code, Section 371.

COUNT II

THE GRAND JURY FURTHER CHARGES: THAT

On or about June 17, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate

personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT III

THE GRAND JURY FURTHER CHARGES: THAT

On or about August 3, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada,

aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT IV

THE GRAND JURY FURTHER CHARGES: THAT

On or about August 25, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GAS-12 hydrologist for

the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT V

THE GRAND JURY FURTHER CHARGES: THAT

On or about September 19, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Exec-

utive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT VI

THE GRAND JURY FURTHER CHARGES: THAT

On or about October 19, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT VII

THE GRAND JURY FURTHER CHARGES: THAT -

On or about October 17, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT VIII

THE GRAND JURY FURTHER CHARGES: THAT

On or about December 11, 1981, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowl-

edge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT IX

THE GRAND JURY FURTHER CHARGES: THAT

On or about January 18, 1982, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by

the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT X

THE GRAND JURY FURTHER CHARGES: THAT

On or about February 16, 1982, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific

Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT XI

THE GRAND JURY FURTHER CHARGES: THAT

On or about March 12, 1982, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in

signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT XII

THE GRAND JURY FURTHER CHARGES: THAT

On or about April 23, 1982, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Govern-

ment officer and employee, through decision, approval and recommendation, in signing a Certificate for Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT XIII

THE GRAND JURY FURTHER CHARGES: THAT

On or about June 1, 1982, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior, Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, un-

lawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate For Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT XIV

THE GRAND JURY FURTHER CHARGES: THAT

In and around September 1982, in the District of Nevada, RICHARD C. JEWELL, being an officer and employee of the Executive Branch of the United States Government, that is, a GS-12 hydrologist for the United States Department of the Interior,

Bureau of Land Management, Reno, Nevada, aided and abetted by DAVID T. HODDER, unlawfully and knowingly did participate personally and substantially as a Government officer and employee, through decision, approval and recommendation, in signing a Certificate for Contract Payment/Invoice submitted by Geoscientific Systems and Consulting pursuant to contract number YA-553-CT1-1017 awarded by the Bureau of Land Management, a contract, claim and matter in which, to the knowledge of RICHARD C. JEWELL, he had a financial interest.

All in violation of Title 18, United States Code, Sections 208(a) and 2.

COUNT XV

THE GRAND JURY FURTHER CHARGES: THAT

On or about August 1, 1982, in the District of Nevada, DAVID T. HODDER did make and present to a department and agency of the United States, that is, the

Department of the Interior, Bureau of Land Management, a claim upon and against that department and agency in the amount of \$9,550, knowing such claim to be false, fictitious, and fraudulent.

All in violation of Title 18, United States Code, Section 287.

COUNT XVI

THE GRAND JURY FURTHER CHARGES: THAT

On or about September 1, 1982, in the District of Nevada, DAVID T. HODDER did make and present to a department and agency of the United States, that is, the Department of the Interior, Bureau of Land Management, a claim upon and against that department and agency in the amount of \$16,600, knowing such claim to be false, fictitious, and fraudulent.

All in violation of Title 18, United States Code, Section 287.

COUNT XVII

THE GRAND JURY FURTHER CHARGES: THAT

On or about October 8, 1982, in the District of Nevada, DAVID T. HODDER did make and present to a department and agency of the United States, that is, the Department of the Interior, Bureau of Land Management, a claim upon and against that department and agency in the amount of \$7,198, knowing such claim to be false, fictitious, and fraudulent.

All in violation of Title 18, United States Code, Section 287.

A TRUE BILL:

FOREPERSON OF THE GRAND JURY

WILLIAM A. MADDOX
United States Attorney

JOHN J. KLEIN
Attorney, Criminal Division
U.S. Department of Justice

STATUTES INVOLVED

TITLE 18, U.S.C.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be

fined not more than \$10,000 or imprisoned not more than five years, or both.

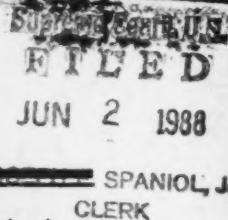
§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his

spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest-

Shall be fined not more than \$10,000, or imprisoned not more than two years, or both.





In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID T. HODDER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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QUESTIONS PRESENTED

1. Whether the district court convicted petitioner based on findings of fact at "fatal variance" with the allegations set forth in the indictment.
2. Whether the evidence produced at trial supported the conviction.
3. Whether petitioner was deprived of a fair trial based on a combination of factors relating to the formulation of the indictment, joinder, and the use of circumstantial evidence.

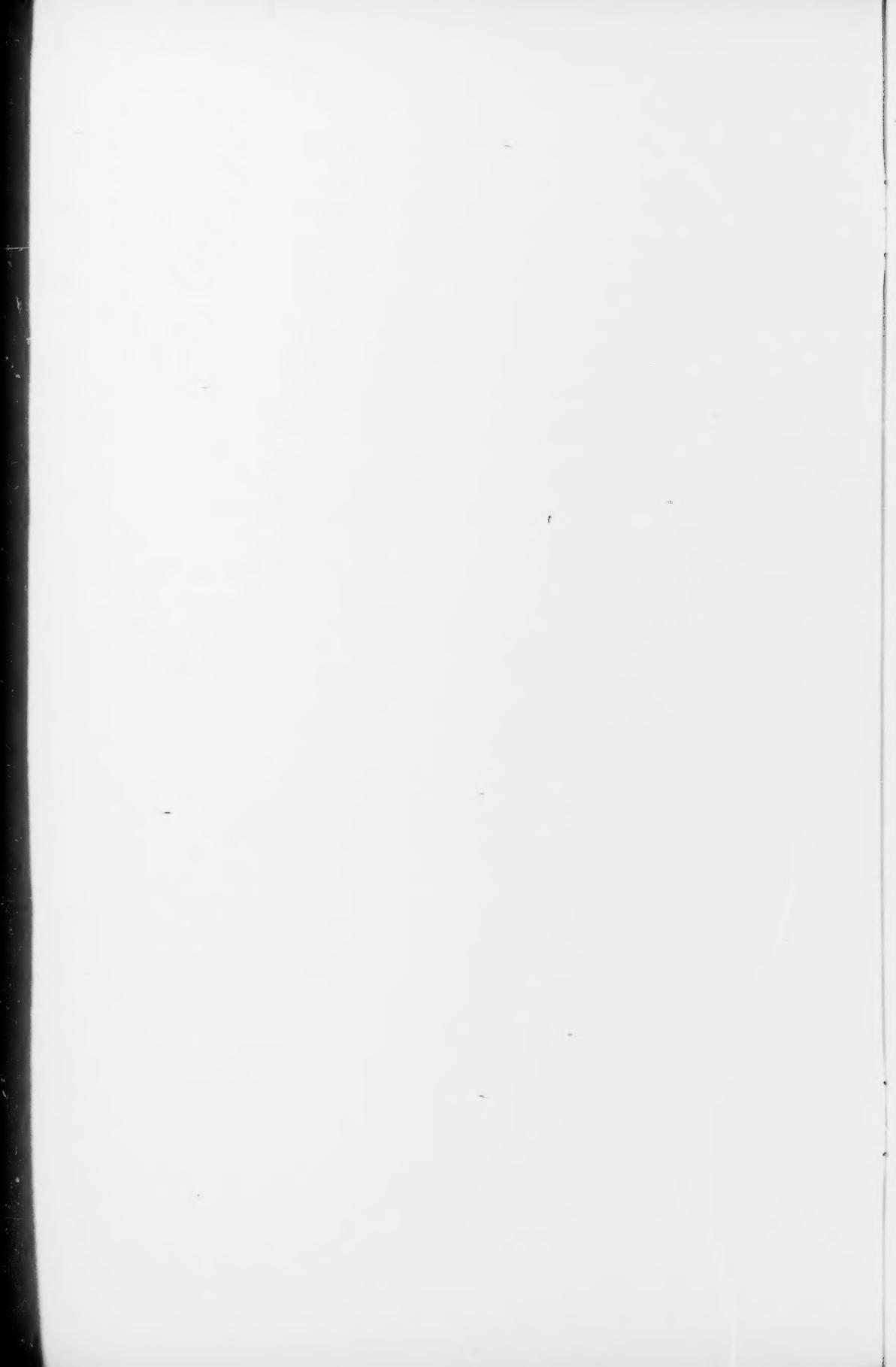


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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1509

DAVID T. HODDER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) and the opinion of the district court (Pet. App. 8-22) are unreported.¹

JURISDICTION

The judgment of the court of appeals (Pet. App. 33-34) was entered on September 4, 1987. A petition for rehearing was denied on December 10, 1987. On February 11, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 9, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ The opinion of the court of appeals in a companion case (Pet. App. 23-32) is reported at 827 F.2d 586.

STATEMENT

Following a bench trial in the United States District Court for the District of Nevada, petitioner was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. He was also convicted of aiding and abetting a federal employee's participation in the administration of a government contract in which the employee held a financial interest, in violation of 18 U.S.C. 208(a). The district court suspended imposition of sentence and placed petitioner on probation for five years. The court of appeals affirmed in part, reversed in part, and remanded (Pet. App. 1-7).

1. Count 1 of the indictment alleged that from approximately November 1980 to January 1983 petitioner and Richard Jewell, an employee of the Bureau of Land Management (BLM) in the Department of the Interior, conspired "to defraud the United States Government of and concerning its governmental functions and rights" (Pet. App. 37-38). Specifically, Count 1 charged that petitioner received a BLM contract for a project proposed by Jewell and then hired Jewell and paid him various sums for services under the contract (*id.* at 39-49). Counts 2 through 14 of the indictment further alleged that from June 17, 1981, through September 1982 petitioner aided and abetted Jewell's participation in the approval of government payments on contract invoices in which Jewell had a financial interest (*id.* at 49-62). Finally, Counts 15 through 17 of the indictment alleged that petitioner submitted false claims under the contract (*id.* at 63-65).

2. In the findings of fact submitted in support of its verdict, the district court first evaluated the evidence supporting Count 1. The court found that petitioner owned Geoscientific Systems and Consulting (GSC) and that the BLM's Technical Proposal Evaluation Committee, chaired

by Jewell, proposed to negotiate a contract with GSC to perform an air quality study in Nevada for the BLM (Pet. App. 10). GSC received the contract and Jewell became responsible for supervising GSC's performance and approving payments due under the contract (*ibid.*). GSC then hired Jewell through various intermediary companies to take aerial photographs as part of the air quality study (*id.* at 10-11). The court found that petitioner and Jewell established the intermediaries "for the purpose of insulating and and disguising payments from the Bureau of Land Management to Jewell through [petitioner]" (*id.* at 12).

The court cited various items of documentary evidence showing that petitioner and Jewell both had "full knowledge of the other's participation in the conspiracy" (Pet. App. 13) and observed that petitioner's testimony "confirmed those findings and conclusions" (*id.* at 13-14; see *id.* at 14-15). The court accordingly concluded that "the government established beyond a reasonable doubt that Defendant Richard Jewell and [petitioner] entered into an agreement to defraud the United States Government of and concerning its governmental functions; that they did so willfully with knowledge of the activities of the other, and in furtherance of the conspiracy, and committed the overt acts set forth in paragraphs 3 through 16 on pages 7 through 9 of the Indictment" (*id.* at 16-17).

The court next addressed the aiding and abetting charges set forth in Counts 2 through 14 of the indictment. The court found that petitioner knew that Jewell "had a present financial interest in the air quality contract and that he participated personally and substantially in the contract," and that petitioner aided Jewell in violating 18 U.S.C. 208(a) by making payments to Jewell through the intermediary companies (Pet. App. 18). The court concluded, however, that the government had failed to prove

beyond a reasonable doubt the false claim charges set forth in Counts 15 through 17 of the indictment (*id.* at 19-20).

3. The court of appeals affirmed in part, reversed in part, and remanded (Pet. App. 1-7). The court rejected petitioner's contention that the district court's findings were at variance with the indictment, observing that the "crime charged was the crime of which [petitioner] was convicted" (*id.* at 4). The court next concluded that the government's evidence was sufficient to sustain the convictions of conspiracy and of aiding and abetting Jewell in a violation of 18 U.S.C. 208(a) (Pet. App. 4-5). The court also rejected petitioner's contention that his trial was "fundamentally unfair" because the government simultaneously prosecuted him on both the conspiracy and the aiding and abetting counts (*id.* at 6-7). However, the court reversed 12 of the 13 aiding and abetting counts as multiplicitous, based on its previous decision holding that Jewell could be convicted on only one of the substantive counts (*id.* at 6, citing *United States v. Jewell*, 827 F.2d 586 (9th Cir. 1987)).

ARGUMENT

Petitioner contends that the district court's factual findings are at "fatal variance" with the indictment (Pet. 15-17, 25-27), that the evidence does not support his convictions (*id.* at 17-20), and that various other factors, related to the formulation of the indictment, joinder, and the use of circumstantial evidence, rendered his trial "fundamentally unfair" (*id.* at 20-23). The court of appeals correctly rejected each of these contentions, and its unreported and factbound decision, which does not conflict with any decision of this Court or another court of appeals, warrants no further review.

1. Petitioner is mistaken in arguing that the district court's factual findings with respect to the conspiracy are at variance with the indictment. The indictment charged petitioner and Jewell with conspiracy "to defraud the United States Government of and concerning its governmental functions and rights" including "its right to have its business and its affairs, particularly the transaction of the official business of the [BLM], conducted free from fraud, conflicts of interest, corruption, dishonesty, deceit, misconduct, partiality and bias" (Pet. App. 38). The indictment was not limited, as petitioner suggests, to "a conspiracy that was formed prior to and had as its object the award of the general contract" (Pet. 15). Instead, the indictment alleged a conspiracy that began "on or about November 1980" and continued through "on or about January 1983, the exact dates being unknown to the grand jury" (Pet. App. 37). Thus, the indictment alleged a conspiracy that continued long after January 15, 1981, the date on which the contract was awarded.² Furthermore, while the indictment expressed the grand jury's belief that the conspiracy commenced prior to the award of the contract, petitioner's conviction did not depend on a finding to that effect. "Convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment." *United States v. Miller*, 471 U.S. 130, 136 (1985). As the court of appeals explained (Pet. App. 3-4 (emphasis in original)):

The district court specifically found [petitioner] guilty of a conspiracy to defraud the government, using the

² Indeed, 8 of the 11 paragraphs describing the "Manner and Means" of the conspiracy related to the conspirators' post-award activities (Pet. App. 40-44), and 14 of the 16 alleged overt acts occurred after the award of the contract (*id.* at 45-49).

precise words of the indictment. The court convicted [petitioner] on the basis of essentially the same acts that were recounted in the indictment. It is of no consequence that the court did not consider that *all* of the acts specified in the indictment were part of the conspiracy. The crime charged was the crime of which [petitioner] was convicted.

See, e.g., *United States v. Miller*, 471 U.S. at 135-140; see also *Ford v. United States*, 273 U.S. 593 (1927); *Salinger v. United States*, 272 U.S. 542 (1926).

2. Petitioner's closely related argument that the evidence does not support his conviction is similarly misguided. Petitioner reasons that the district court's "general finding of guilt" conflicts with its finding of a "post-award conspiracy" (Pet. 17) because, in petitioner's view, the indictment permitted conviction only on the basis of a pre-award conspiracy and "the evidence was wholly insufficient to support a finding that he had entered into the pre-award conspiracy" (*id.* at 18-19). But as we have explained, the district court's determination of guilt was based on its finding that petitioner engaged in the conspiracy charged in the indictment. As the court of appeals stated, "any rational trier of fact could find beyond a reasonable doubt that [petitioner] willfully became a member of a conspiracy to defraud the government, and that he committed several overt acts in furtherance of the conspiracy" (Pet. App. 4). This Court does not, of course, "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 8 (quoting *Graver Tank & Mfg. v. Linde Co.*, 336 U.S. 271, 275 (1949)). See also *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). This is not such a case.

3. Petitioner raises a collection of unarticulated "fair trial concerns" (Pet. 20) that rest on the government's election to charge petitioner with conspiracy and multiple counts of aiding and abetting, its decision to try petitioner and Jewell in a single proceeding, and its use of "circumstantial evidence" at trial (*id.* at ii-iii). But to the extent that these factbound arguments were raised in the court of appeals, they were correctly rejected (Pet. App. 6-7), and petitioner himself "does not contend that these concerns or the third question presented would, alone, warrant review by this Court" (Pet. 20).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

JUNE 1988

No. 87-1509

Supreme Court, U.S.
FILED
JUN 9 1988
REGISTRATION OF MAIL, JR.
COURT

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DAVID T. HODDER,

Petitioner.

v.

THE UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit*

PETITIONER'S REPLY

MARTIN H. HODDER
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Attorney for petitioner David T. Hodder

June 6, 1988



No. 87-1509

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DAVID T. HODDER,

Petitioner.

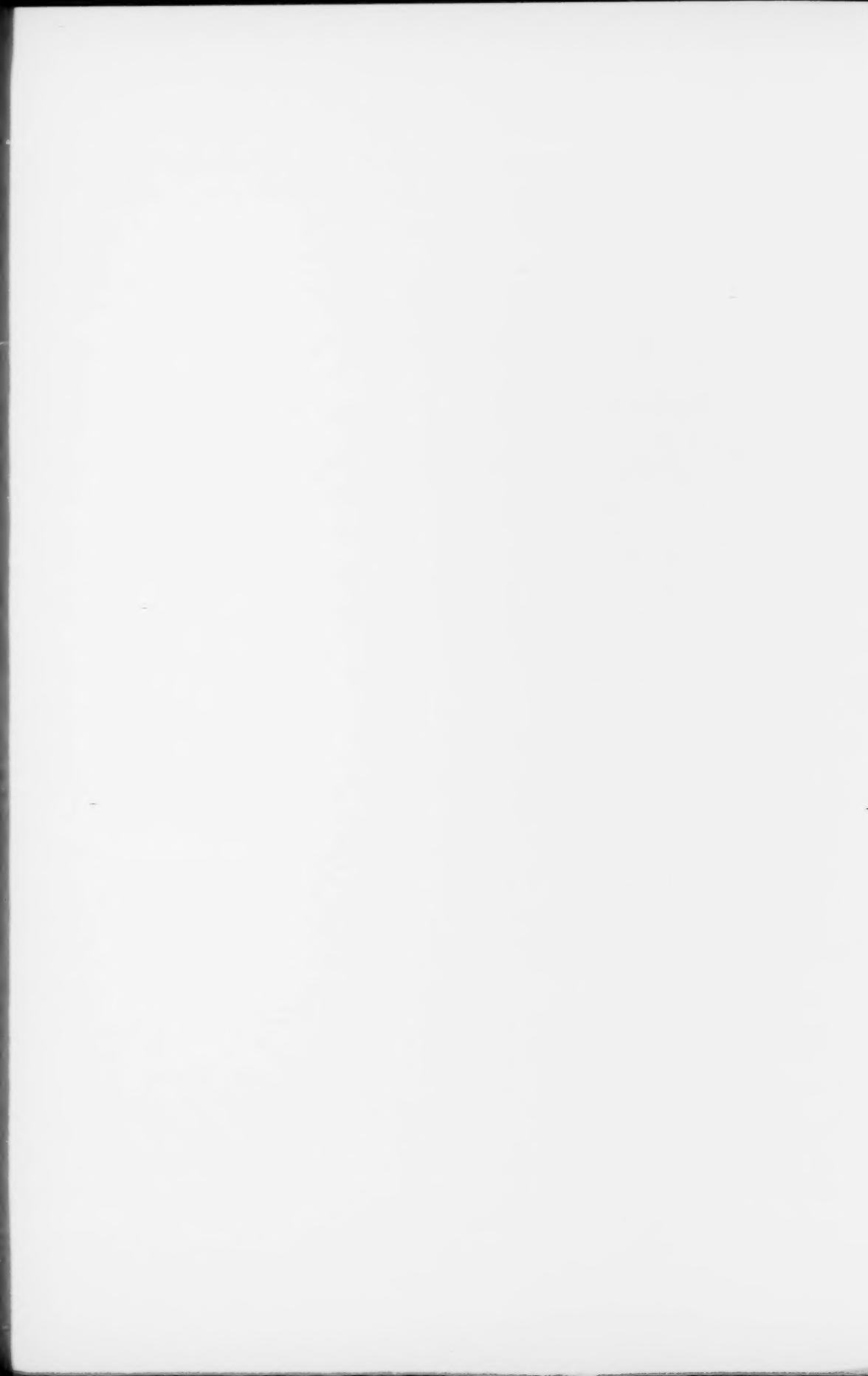
v.

THE UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari
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for the Ninth Circuit*

PETITIONER'S REPLY



PETITIONER'S REPLY

Two points made in the Brief for the United States in Opposition merit reply:

1. The present case does not involve a narrowing variance of the kind that the Court dealt with in United States v. Miller, 471 U.S. 130 (1985). The district court's factual findings in this case make it clear that the conspiracy of which petitioner was convicted was different in time and object from the conspiracy in the indictment. The indictment alleged a "pre-award" conspiracy that had as its object, from petitioner's standpoint, the award of the underlying contract. The district court convicted Mr. Hodder of entering into a conspiracy that was initiated after the contract had been awarded in exchange for such "subtle benefits" as might accrue from having a "continued close relationship" with the government employee. That is not the crime that the

grand jury was persuaded that there was probable cause to charge. It is not clear the grand jury would have found probable cause to indict a person of the stature of petitioner as participant in a corrupt conspiracy with a low level government employee in exchange for "subtle benefits" such as assuring only "superficial scrutiny" of his performance and requests for progress payments.

As Petitioner reads its brief, the government acknowledges that there was insufficient evidence to support a finding that the conspiracy was formed prior to the award of the contract (Br. Opp. at 6). It is thus clear that the issue of whether the variance was impermissible is clearly framed in this case.

2. The issues presented merit this Court's attention because they arise in context with government contracting. The federal government conducts a substantial

part of its business by entering into agreements with private contractors. Those are legitimate transactions which require the making of agreements. The questions presented in this case warrant review because the Court should determine what procedures the government must observe when it seeks to extend liability for misconduct by one of its own employees to a private contractor.¹

Respectfully submitted,

Martin H. Hodder
1131 N.E. 86th Street
Miami, Florida 33138
(305) 751-8706
Attorney for David Hodder

1. The government understates the consequences of the conviction to petitioner as an individual (Br. Op. at 2). Those matters are largely irrelevant, however, in determining whether this case merits the Court's review.